

May 23, 2005

Velina Consuelo Underwood
Gualala Municipal Advisory Council, Chair
39126 Ocean Drive, Suite B
P.O. Box 862
Gualala, California 95445

Re: Your Request for Advice
Our File No. A-05-077

Dear Ms. Underwood:

This letter is in response to your request for advice regarding the conflict-of-interest provisions of the Political Reform Act (the “Act”).¹ This advice letter extends to the second question contained in your correspondence dated April 14, 2005 (see below).² It should be noted that the Fair Political Practices Commission (“Commission”) does not act as a finder of fact when providing assistance; this assistance is based solely on the facts you provide. (*In re Oglesby* (1975) 1 FPPC Ops. 71.)

QUESTION

Do you have a conflict of interest participating in a decision to recommend a request for development or use permits by an individual against whom you, as a private attorney, represented a former client?

CONCLUSION

No.

¹ Government Code sections 81000 – 91014. Commission regulations appear at title 2, sections 18109-18997, of the California Code of Regulations. All further references to statutory “sections” will be to the Government Code and all further references to “regulations” will be to title 2 of the California Code of Regulations, unless otherwise indicated.

² This letter does not address the first, factually distinct question posed in your correspondence. That question asks whether you may inform your fellow council members of an appeal being heard before the Mendocino County Board of Supervisors on May 10, 2005. The Commission does not give advice regarding past conduct. (Reg. 18329(b)(8)(A).)

FACTS

The following facts are based upon those contained in your letter dated April 14, 2005, and in two telephone conversations between you and the Commission's staff counsel which occurred in May 2005. You are the Chairperson of the Gualala Municipal Advisory Council ("GMAC"). As a member of the GMAC, you are required to file an annual statement of economic interest under your local jurisdiction's conflict-of-interest code. The GMAC is an advisory board, whose members are appointed by one of the supervisors on the Mendocino County Board of Supervisors. The GMAC recommends approval or denial of coastal development permits or conditional use permits to the Mendocino County Department of Planning and Building ("Planning Department").

The Planning Department gathers input from various agencies, including the GMAC, and then prepares a staff report. That staff report is presented to the head of the Planning Department (in his or her role as Coastal Permit Administrator) who then either grants or denies the permit at a public hearing. Those opposing the grant or denial of such a permit may appeal the head of the Planning Department's decision by filing an appeal with the Mendocino County Board of Supervisors. Such appeals are reviewed by the Board of Supervisors under a de novo standard.

Aside from your duties as Chair of the GMAC, you are an attorney in private practice specializing in the areas of real estate law and estate planning. Last year, you represented a client in litigation regarding the sale of real property to an adverse party. Your client and the adverse party eventually resolved their dispute through a settlement agreement which you facilitated. Your client has completely paid you (\$25,000) for your legal services associated with that matter. Both the sale of the real property at issue, and the litigation surrounding it, has been completed. Your client has since moved to another state and you no longer represent her, or anyone else, on any matters involving the adverse party.

The adverse party to the litigation just described, currently has plans to seek approval for certain development and use permits from GMAC – some involving the real property which was the subject of the above-described litigation.

ANALYSIS

The Act's conflict-of-interest provisions ensure that public officials will "perform their duties in an impartial manner, free from bias caused by their own financial interests or the financial interests of persons who have supported them." (Section 81001(b).) Section 87100 prohibits any public official from making, participating in making, or otherwise using his or her official position to influence governmental decisions in which the official has a financial interest, unless some exception applies.

The Commission has adopted an eight-step standard analysis for deciding whether an official has a disqualifying conflict of interest. (Reg. 18700(b).) The general rule,

however, is that a conflict of interest exists whenever a public official makes a governmental decision which has a reasonably foreseeable material financial effect on one or more of his or her financial interests. (Section 87103.)

Steps 1 & 2: As Chairperson of the GMAC, Are You a Public Official Making, Participating in Making, or Influencing a Governmental Decision?

A “public official” means every member, officer, employee or consultant of a state or local government agency. (Section 82048; see also Sections 82003 [defining “agency”], 82014 [defining “local government agency”], and 82019 [defining “designated employee”].) A “member,” for purposes of defining “public official” includes, but is not limited to, salaried or unsalaried members of committees, boards or commissions with decision making authority. (Reg. 18701(a)(1).)

You are the Chairperson of the GMAC, an advisory board which recommends approval or denial of coastal development permits or conditional use permits to the Mendocino County Planning Department. You are required to file a statement of economic interest annually under your local jurisdiction’s conflict-of-interest code.

Additionally, you have described yourself as one who occupies a position which requires you to make, participate in making, and/or influencing governmental decisions regarding development and conditional use permits. (See Regs. 18702 – 18702.4.) Consequently, again barring any applicable exception, you are prohibited from making, participating in making, or otherwise using your official position to influence any decision which will have a reasonably foreseeable material financial effect on any economic interest you may have.

Step 3: Do You Have A Potentially Disqualifying Economic Interest?

A public official has a financial interest in a decision within the meaning of section 87103 if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on any of the following types of interests:

- An economic interest in a business entity in which he or she has a direct or indirect investment of \$2,000 or more (Section 87103(a); Reg. 18703.1(a)), or in which he or she is a director, officer, partner, trustee, employee, or holds any position of management (Section 87103(d); Reg. 18703.1(b));
- An economic interest in real property in which he or she has a direct or indirect interest of \$2,000 or more (Section 87103(b); Reg. 18703.2; see Section 82033 [defining “Interest in real property”]);
- An economic interest in any source of income, including promised income, which aggregates to \$500 or more within 12 months prior to the decision (Section 87103(c); Reg. 18703.3);

- An economic interest in any source of gifts to him or her if the gifts aggregate to \$360 or more within 12 months prior to the decision (Section 87103(e); Reg. 18703.4);
- An economic interest in his or her personal finances, including those of his or her immediate family -- this is the 'personal financial effects' rule. (Section 87103; Reg. 18703.5.)

The law practice you own constitutes an economic interest in a business entity in which you have a direct or indirect investment of \$2,000 or more, and in which you are a, if not the sole, partner. (Section 87103(a) & (d); Reg. 18703.1(a) & (b).)

The client who paid you the fees also constitutes an economic interest in a source of income (including any promised income) which aggregates to \$500 or more within 12 months prior to the decision. (Section 87103(c); Reg. 18703.3(a)(1).)

Whether the types of identified economic interests give rise to a conflict-of-interest now depends upon whether such interests will have a reasonably foreseeable, material impact on governmental decisions with which you are charged. (Regs. 18700(a), 18705.)

Step 4: Are The Economic Interests Identified Directly or Indirectly Involved in The Governmental Decision?

In order to determine if a governmental decision's reasonably foreseeable financial effect on a given economic interest is material, it must first be determined if the official's economic interest is directly involved or indirectly involved in the governmental decision. (Reg. 18704(a).)

A person -- including business entities or sources of income -- is directly involved in a decision before an official's agency when that person, either directly or by an agent: (1) initiates the proceeding in which the decision will be made by filing an application, claim, appeal, or similar request, or (2) is a named party in, or is the subject of, the proceeding concerning the decision before the official or the official's agency. (Reg. 18704.1(a)(1) & (a)(2).)

Neither your law practice nor your former client are initiating proceedings before the GMAC. Neither your law practice nor your former client are a named party that is the subject of a proceeding concerning a decision before the GMAC. Therefore, neither your law practice nor your client is directly involved in a governmental decision before the agency of which you are the Chairperson, and are therefore indirectly involved.

Steps 5 & 6: Materiality Standard and Defining “Reasonable Foreseeability.”

A conflict of interest may arise only when the reasonably foreseeable impact of a governmental decision on a public official’s economic interests is material. (Regs. 18700(a), 18705, 18706.) Different standards apply to determine whether a financial effect will be material, depending upon the nature of the economic interest and whether that interest is directly or indirectly involved in the governmental decision under consideration. (Reg. 18705.)

Since we have determined that the identified business entity (your law practice) and source of income (your former client) under scrutiny are both *indirectly* involved with the GMAC’s anticipated governmental decision, at best, we must now analyze whether the financial effect of that decision on your law practice and client is reasonably foreseeable³ to be material or not. (See Reg.s 18705.1(c) [materiality standard for indirectly involved business entities], and 18705.3(b)(3) [materiality standard for indirectly involved sources of income that are individuals].)

Business Entity

Under regulation 18705.1, subdivision (c), the materiality standards for indirectly involved business entities depend on the relative size of the business entity. Though we have not been provided facts regarding the economic size of your law practice, you have informed us that you are a sole practitioner and specialize in real estate and estate planning law in the small town of Gualala. Assuming your law practice were determined to be a small business entity (see Reg. 18705.1(c)(4)), the financial effects of a governmental decision would not be considered material unless the decision under scrutiny impacted your business as described below:

“(A) The governmental decision will result in an increase or decrease in the business entity’s gross revenues for a fiscal year in the amount of \$20,000 or more; or,

“(B) The governmental decision will result in the business entity incurring or avoiding additional expenses or reducing or eliminating existing expenses for a fiscal year in the amount of \$5,000 or more; or,

“(C) The governmental decision will result in an increase or decrease in the value of the business entity’s assets or liabilities of \$20,000 or more.” (Reg. 18705.1(c)(4).)

You have provided facts indicating that the effect of any GMAC decision on your law practice, resulting from a request for approval of development or use permits by the party previously adverse to your former client, is not foreseeable. Your representation in

³ A material financial effect on an economic interest is reasonably foreseeable if it is substantially likely that one or more of the materiality standards applicable to that economic interest will be met as a result of the governmental decision being analyzed. (Reg. 18706(a).)

the prior matter has now ended and you are no longer owed any fees as a result. Therefore, it does not appear that your law practice stands to gain or lose (economically) regardless of what decisions the GMAC may make with regard to your former client's adversary and his request for permit approval. Because of this, there is no reasonable, foreseeable and material financial effect on your law practice resulting from the contemplated GMAC decision.

Source of Income

Under regulation 18705.3, subdivision (b)(3), an indirectly involved source of income that is an individual is deemed to have a material impact on a governmental decision if: (1) the decision will affect the individual's income, investments, or other tangible or intangible assets or liabilities (other than real property) by \$1,000 or more, or (2) the decision will affect a real property interest of the individual in specified ways. (Reg. 18705.3(b)(3).)

This analysis is very similar to that applied to your law practice. The effect of any GMAC decision on your former client's finances, does not appear to be foreseeable. Your representation in the prior matter has now ended and you are no longer owed any fees by your former client as a result. Therefore, regardless of whether that representation involved land for which your former client's adversary plans to seek development and use permits, your former client does not stand to gain or lose (economically) regardless of what decisions the GMAC may make. Because of this, there is likely no conflict-of-interest between your (past) economic interest in your former client as a source of income, and a GMAC decision regarding the anticipated request for permit approval.

It should also be noted that a reasonably foreseeable financial effect on a public official's personal finances is deemed material if it is at least \$250 in any 12-month period. (Reg. 18705.5.) This is commonly referred to as the materiality standard for "personal financial effects." But again, because any financial association between you (or your law practice) and your former client has ended, no decisions of the GMAC can have a personal financial effect on you.

Steps 7 & 8: The "Public Generally" and "Legally Required" Exceptions

If we had determined that a conflict-of-interest existed, regarding the proposed governmental decision discussed above and your identified economic interests, we would then have examined whether you could still participate in the described governmental decision-making process under either the "public generally" or "legally required participation" exceptions contained in the Act. (See Regs. 18707 et seq. and 18708 et seq.)

If neither exception applied, then the conflict of interest would have been deemed a disqualifying conflict of interest and you would not have been able to participate in making or influencing the governmental decision in question.

If you have any other questions regarding this matter, please contact me at (916) 322-5660.

Sincerely,

Luisa Menchaca
General Counsel

By: Andreas C. Rockas
Staff Counsel, Legal Division

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